IN THE

Supreme Court of the United States

OCTOBER TERM 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
APPELLANT,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, THE COMMONWEALTH OF VIRGINIA, AND THE TOWN OF WISE, VIRGINIA,
APPELLEES.

NO. 79-1538

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
APPELLANT,

v.

STATE OF INDIANA, INDIANA COAL ASSOCIATION, MEADOWLARK FARMS, INC., AMAX COAL COMPANY, PEABODY COAL COMPANY, AND JOHN A. CONLON,
APPELLEES.

NO. 80-231

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v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
APPELLEE.

NO. 79-1596

BRIEF OF THE STATES OF ARIZONA, HAWAII, NEVADA, NORTH DAKOTA, OREGON, UTAH, WASHINGTON AND WYOMING AS AMICI CURIAE

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BRIEF OF THE STATES OF ARIZONA, HAWAII, NEVADA, NORTH DAKOTA, OREGON, UTAH, WASHINGTON AND WYOMING AS AMICI CURIAE

The several States appearing as *amici curiae* herein respectfully urge the Court to affirm the decisions of the respective district courts in Virginia and Indiana holding that Title V of the Federal Surface Mining Control and Reclamation Act of 1977 unconstitutionally interferes with inherent sovereign powers of the States to regulate the use of private non-federal lands within their borders, and with State land-use decisions respecting the development of mineral resources vital to the progress and prosperity of their communities and citizens. The Amici States herein are particularly concerned because substantial quantities of lands subject to the Act are State owned lands. Additionally, the Amici States have within their borders vast quantities of mineral resources which will be subject to the provisions of the Act.

INTEREST OF AMICI CURIAE

The constitutional issues presented in these cases are of critical importance to the States in terms of retaining control over their essential State powers, and their ability to continue to function effectively within a federal system. If the authority to determine the appropriate use of private lands within the States may, by Congressional fiat, be transferred to a federal agency in Washington, an essential element of State sovereignty is effectively destroyed, and long established federal-state relationships will be drastically altered.

From the earliest days of the Republic the individual States and their constitutent counties and municipalities have exercised land use powers, subject only to constitutional limitations upon taking of private property without just compensation and due process of law under the Fourteenth Amendment. *Penn Central Transportation Company v. New York City,* 438 U.S. 104 (1978). Such land use powers have included the promulgation of zoning laws and regulations, enforcement of building codes, granting and terminating permits for operation of mines and quarries, imposition of severance taxes on minerals extraction, exercise of eminent domain, and many related police power functions.

As early as 1909 the city of Boston validly imposed height restriction on its buildings. *Welch v. Swasey,* 214 U.S. 91 (1909). Even before that, it had been decided that local police power extended to regulation of natural resources. *Hudson Water Co. v. McCarter,* 209 U.S. 349 (1908). By 1926, it was decided that communities could control their development through the enactment of zoning ordinances. *Euclid v. Ambler,* 272 U.S. 365 (1926). Following that landmark case, the local zoning power was so well settled that the Supreme Court was able to remain divorced from considering any zoning cases for over 50 years. See 13 Wake Forest L. Rev. 107. When the Court recommenced considering the zoning power in the early 1970's it reaffirmed the principle that zoning is a peculiarly local function.

As noted by this Court in *Warth v. Seldin,* 422 U.S. 490, 508 N. 18 (1975) "[Z]oning laws and their provisions, long considered essential to urban planning, are peculiarly within the province of the State and local legislative authorities."

It hardly needs to be emphasized that the States have an overriding interest in preservation of these traditional governmental functions and are deeply concerned by the federal government's assertion of preemptive power under the Surface Mining act to dictate the land use criteria which a State must adopt and enforce as a precondition to permitting surface mining on lands within the State.

The federal interest to be served in comparison to the States' role in land use planning and regulation appears miniscule. Although the act's Statement of Policy in section 101(f) purports to recognize State primacy "in developing, issuing and enforcing regulations for surface mining and reclamation operations," the actual effect of Title V is quite the opposite, since it provides that unless a State regulatory program conforms in all respects with the standards established by the act and the regulations issued by the Secretary of the Interior the State program is displaced by a federal program enforced and administered by the Secretary. By imposing these requirements on activities within a state, the Act necessarily limits the State's exercise of traditional sovereign perogatives and choices in the determination of the land use policies it will follow.

TITLE V OF THE ACT CONSTITUTES LAND USE LEGISLATION WHICH SUPERSEDES STATE GOVERNMENTAL PROCEDURES FOR LAND USE PLANNING, AND, AS SUCH, USURPS POLICE POWERS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT

Introjection of federal authority into local land use matters is at odds with our history, our traditions and our Constitution.

Local control of land matters in the United States has had an interesting and informative history leading to well

established governmental institutions. Thomas Jefferson outlined his position on land tenure in 1774. He was convinced that the feudal system introduced to England with the Norman Conquest of 1066, which displaced the Saxon system under which individual men could hold their lands in absolute dominion, was unnatural and inappropriate for Virginia. The feudal incidents were too burdensome to be tolerated in the new country. He argued that landholding in America ought to be allodial like the Saxon landholding system. See Thomas Jefferson, *A Summary View Of The Rights Of British America Of 1774.* (Williamsburg, 1774), reprinted in *The Papers Of Thomas Jefferson* (Princeton: Princeton University Press, 1950), Vol. I, pp. 121–135. This view of the ownership of land, based firmly on the teachings of John Locke, were reasserted in the Declaration of Independence, See P. Gates, *History Of Public Land Law Development,* (Washington, D.C., 1968) p. 3.

Prior to the Revolution "Every acre of land in this country was then held mediately or immediately by grants from . . . [the] Crown." *Chisolm v. Georgia,* 2 Dall. (2 U.S.) 419, 470 (1793). "When the revolution took place, the people of each state became themselves sovereign . . . subject only to the rights since surrendered by the Constitution to the general government." *Martin et. al., v. Waddell,* 16 Peters (41 U.S.) 367, 410 (1842). After the Revolution, responsibility was assumed by the states as representatives of the people for issuing land titles and for abolishing or modifying such incidents of feudalism and feudal arrangements as existed and establishing an allodial system of tenure. Lands were then deemed to be held in the tenure of the state as sovereign in place of the crown.

See Cornelius J. Moynihan, *Introduction To The Law Of Real Property,* (St. Paul: West Publishing Co., 1962) p. 26; see also *Wallace v. Harmstad,* 44 Pa. 499, 501 (1863).

It may not now be gainsaid as a general proposition that the States and their citizens collectively enjoy less than complete authority over the privately held lands within the States. To recognize now a centralized federal authority to impose conditions on the use of private lands would be the harbinger of an erosion of State sovereignty that would ultimately lead to a return of centralized land controls which were rejected by our forefathers. Pursuant to the well recognized sovereign authority of the States, police powers in the areas of land use planning and regulation of private lands have traditionally been exercised exclusively by the States. To carve out an exception to the States' plenary authority to accommodate federal regulation of surface mining would open the door to federal regulation of other activities and uses; farming, for instance may be next, and thereafter any of the multitudinous uses which are made of private lands could conceivably be the subject of federal regulation. Based upon well established principles of federalism involving the division of federal-state powers, each of the district courts properly drew a line in the cases before them.

Each of the respective district courts below found, with abundant supporting evidence, that the focus and thrust of the Surface Mining Act is control of the use of land, and that its effect is to preempt the traditional land use powers reserved to the States under the Tenth Amendment. Any doubt as to the preemptive character of the act is quickly dispelled by the plain language of section 503 which provides that a State may not allow private lands

within its jurisdicition to be used for surface coal mining unless it adopts a state law providing for regulation of surface mining and reclamation operations, and imposes sanctions for violations of such regulations, which "shall meet the minimum requirements of this Act." Other sections of Title V prohibit surface mining on various categories of lands, require that a State desiring to retain any enforcement authority under the Act must establish a planning process for designating other land areas as unsuitable for mining in accordance with the specified criteria of the Act, and dictate in great and massive detail the terms and conditions under which a State may grant or renew permits for surface coal mining. (Sections 502, 506, 507, 522.) The Act also deals extensively with permissible post-mining use of lands after mining and reclamation have been completed. (Section 508.) To suggest, as the Secretary does, that these provisions are not preemptive of State powers is to ignore reality.

Moreover, the Act on its face boldly asserts its preemptive effect. Section 504 directs that the Secretary promulgate and implement a federal program for any State which fails to adopt a State program meeting the Scretary's approval, and that promulgation of such a Federal program "vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance with this Act." Whenever a federal program is promulgated for a State by the Secretary "[A]ny statutes or regulations of such a State which are in effect to regulate surface mining and reclamation operations shall . . . be *preempted and superseded* by the Federal program." (Section 504(g).) Emphasis added.

Despite this starkly coercive language the Secretary continues to argue that the States are not compelled to enforce the Act, but are merely *encouraged* to enforce it. The reality is that the only option given to a State is to adopt federally dictated regulatory criteria or relinquish all State authority over surface mining and leave the field to the federal enforcers. In substance, Congress has said to the States "You cannot allow your lands to be used for surface mining unless you comply with the federally mandated terms and conditions, and if you do not accept such terms and conditions the Secretary of the Interior will administer your lands." The choice which the Secretary contends the Act allows the States is an illusion. Whether a State elects to adopt federally mandated land use policies and enforcement procedures, or abdicates these functions to the Secretary of the Interior, the result is the same—the State's authority to determine the appropriate use of land is subordinated to the federal power. The principles enunciated by the Court in *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937) make it clear that where it is shown that a federal program involves "weapons of coercion, destroying or impairing the autonomy of the States" Tenth Amendment questions are squarely presented. The Surface Mining Act's provisions leave little room for doubt that they are "weapons of coercion."

Federal control over private land uses has consistently been suspect. Congress, by enacting the Clean Air Act has effectively imposed restrictions on land use which restrict municipal choices. Affected states challenged the restrictions on both statutory and constitutional ground. The Courts of Appeals in the Ninth, Fourth, and D.C. Circuits have invalidated the regulations, relying on statutory

interpretation. The constitutional issues involved were again avoided when one of these cases was reviewed by this Court in *EPA v. Brown,* 431 U.S. 99, 1977). In that case however the government conceded in its brief that regulations requiring states to adopt laws were constitutionally invalid. *Id.* at 103.

In 1973 Congress considered the Land Use Policy and Planning Assistance act and ultimately rejected it. One bill that surfaced, (S268), was designed to encourage land use planning by state and local governments by providing economic incentives. It did not attempt to mandate, require, or allow "Federal planning" or "Federal zoning." Rep. No. 93-197, 93rd Cong., 1st Sess., (1973) at 61. The reason for this was simple: "The Federal Government has no police power to regulate lands within a State which are privately owned or owned by the State. Only the State has constitutional authority to control and regulate these lands." *Id.* at 60. The report went on to recognize that:

> "The States have exercised land use controls for hundreds of years in one form or another. It was only in the early part of the 20th Century, however, that the States began to do so in a broad and general way. This came with the adoption of model State laws which generally delegated zoning authority—a part of the State's inherent police powers—to units of local government. The purpose of this delegation of police power authority to counties, cities, and other units of local government was to enable them to develop master plans, to zone for permissible uses and to establish local planning bodies. *Id.*

Prior to the development of a statutory framework for land use planning and control, the report noted, injured parties sought their remedies through the common law

doctrines of nuisance and trespass. Senator Helms correctly stated the fundamental consideration on the floor of the Senate: "The great body of law concerning land use control has developed through our state courts where it properly belongs." 119 Cong. Rec. 20630 (1973).

The Amici States submit that the positive law emanating from Congressional statutes and federal regulations, when imposed upon local land use concerns without reference to the societal expectancies arising from the customs, traditions, and needs of the locality, is inadequate to accommodate the myriad competing interests in a fashion that State courts applying State law have traditionally accomplished.

THE COMMERCE CLAUSE POWERS OF THE FEDERAL GOVERNMENT DO NOT JUSTIFY FEDERAL REGULATION OF PRIVATE LANDS WITHIN STATE JURISDICTION

Over the past 40 years since its decision in *United States v. Darby,* 312 U.S. 100 (1941), the Court has broadly construed the federal commerce power to cover many activities previously regarded as purely local in nature, but has never held, or even intimated, that land *as such* is subject to regulation under the Commerce Clause. In the relatively few cases in which the subject has been even touched upon the Court has uniformly held that federal land use powers are limited to those which are derived from the Property Clause of Article 4, Section 3, Clause 2 of the Constitution, i.e., legislative powers over federally owned lands. See, *Kansas v. Colorado,* 206 U.S. 46 (1907); *United States v. Arizona,* 295 U.S. 174 (1935); *Kleppe v. New Mexico,* 426 U.S. 529 (1976); *California v. United States,* 438 U.S. 645 (1978). In *McCready v. Virginia,* 94 U.S. 391 (1877) the Court noted that "Commerce has nothing to do with land while producing, but only with the product after

it has become the subject of trade." 94 U.S. at 396. This premise is as valid today as it was 100 years ago.

Even if it were assumed, however, that the reach of the commerce power extends to land use it would not justify federal usurpation of the historic reserved powers of the States in this field. As noted in *National League of Cities v. Usery,* 426 U.S. 833 (1976) "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Article I of the Constitution," 426 U.S. at 842, and "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from expressing the authority in that manner." 426 U.S. at 845. The test in judging whether federal regulation is constituionally permissible is whether is interferes with a State's "freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. The Court has recognized as "constitutional policy" that Congress "may not exercise its power in a fashion that impairs the States' integrity or their ability to function in a federal system." *Fry v. United States,* 421 U.S. 542 (1975).

The preemptive scheme embodied in Title V of the Surface Mining Act works just such an impairment of State sovereignty. Land use planning is by any measure one of the "integral" functions through which the States can make provision for the orderly development of their natural resources, as well as promoting employment and economic sustenance for their citizens, and revenue sources

for essential services furnished through State and local governmental agencies. Because the States are closer to the problems and needs of their local communities and citizens than are the federal bureaus in Washington they are obviously in a better position to make the necessary decisions in these vital areas. What is even more obvious is the fact that it was never the intent of the framers of the Constitution that the central government could override the sovereign powers of the States in such areas. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 203 (1827); *New York v. Miln,* 36 U.S.[1] 102 (1837) *Kansas v. Colorado,* 206 U.S. 46 (1907).

The rationale advanced in justification for the exercise of the commerce power in this statute hangs on the premise that there are environmental values at stake in the use of land for surface mining, and that the environmental concerns of the federal government must be given precedence over the multitude of economic, social and political priorities which may be advanced by the States. The district courts below correctly perceived, however, that the focus of Title V is on the land itself and not on the commerce aspects of land use, and that the end result is creation of a body of federal police powers which displaces the traditional police powers of the States.

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[1]As the Court noted in Miln: ". . . [I]t is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner if its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive." 36 U.S. 138.

Hence, the ultimate question presented is whether the target of the federal Act, i.e. land, can by any valid rationale be held to be in commerce. If land *as land* is not in commerce a Congressional incantation that its use affects interstate commerce cannot serve to bring it within the scope of federal regulatory powers under the commerce clause.

A contrary conclusion would open a Pandora's Box which could shatter the structure of the federal system as it now exists, since there is almost no use of land which could not to some extent at least be held to affect interstate commerce, whether such use be agriculture, forestry, industrial plants, warehouses, retail shopping centers, or countless other purposes. In the end, all lands used or having a potential use for any activity affecting commerce become proper subjects for federal land use regulations.

THE FIFTH AMENDMENT ISSUES

Amici believe that the district court below have properly held that the provisions of Title V of the Surface Mining Act effectively destroy land values, and in their operation and effect deprive the owners of the mineral estates in coal lands of valuable property rights without just compensation and in violation of the due process clause of the Fifth Amendment. While these are issues of grave concern to the States, *Amici* will leave to those most directly affected the task of arguing the applicable points of law. *Amici* will simply observe that a severe injustice will be wrought upon their citizens if the guarantees of the Fifth Amendment can be casually overridden by federal legislation of this sort.

CONCLUSION

The constitutional implications of a further expansion of federal regulatory powers into the zone of land use are immense. The Surface Mining Act raises the critical question of whether Congress can effectively amend the Constitution through the simple mechanism of making a legislative finding that the use of land for a particular purpose affects interstate commerce. Such a confiscation of reserved powers is not constitutionally permissible unless the Tenth Amendment has no force and effect in confrontation with the Commerce Clause. For these reasons the decisions of the district courts below should be affirmed.

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